

DEC 26 1944

Supreme Court of the United States

OCTOBER TERM 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE  
ESTATE OF JOHN LEWIS TILLER, DECEASED,

*Petitioner,*

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT

✓ THOMAS W. DAVIS  
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✓ COLLINS DENNY, JR.  
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## BRIEF FOR RESPONDENT

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The plaintiff appellant has filed a statement that she will rely upon her brief in support of her petition for certiorari as her brief on argument. Were the only points involved those decided against her by the Circuit Court of Appeals, we should do likewise. But the whole record is before this Court, and we propose to urge, as we are at liberty to do (*U. S. v. American Ry. Express Co.*, 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 560; *Langnes v. Green*, 282 U. S. 531, 75 L. Ed. 520, 51 S. Ct. 243; *Morley v. Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, 57 S. Ct. 325; *Helvering v. Pfeiffer*, 302 U. S. 247, 82 L. Ed. 231, 58 S. Ct. 159; *Le Tulle v. Scofield*, 308 U. S. 415, 84 L. Ed. 355, 60 S. Ct. 313) matter appearing in that record and not touched upon in the petition for the writ or in the brief in support thereof. Hence this brief.

## OPINIONS BELOW

The District Court handed down no written opinion on the merits of the case. Its order is found on pages 197-8 of the Record. The opinion of the Circuit Court of Appeals is reported in 142 F. (2d) 718, and is found on pages 200 *et seq.* thereof. Its judgment is found on page 208.

## STATEMENT OF THE CASE

In part, we rely upon the lack of any credible evidence to sustain a verdict. It is, accordingly, necessary to show what the evidence was, for only by so doing can this negative proposition be sustained.

The original complaint was specifically filed under the Federal Employers' Liability Act, 45 U. S. C. A. 51, *et seq.* (R. 2).

It charged negligence in seven particulars, i. e. (1) failure to keep a lookout, (2) failure to give proper warning signals, etc. Each of these particulars alleged an affirmative act of negligence—such an act as would permit a recovery at common law. No one of them intimated the violation of any statutory duty or safety appliance act.

More than three years after the accident and death, the plaintiff was permitted to amend by alleging the violation of the Boiler Inspection Act, 45 U. S. C. A. 22 *et seq.*, and the rules and regulations of the Interstate Commerce Commission prescribed pursuant thereto. The new matter is found in the first twelve printed lines of par. 5 of the Amended Complaint (R. 7-8).

Defendant opposed the motion to amend (R. 5-6) and later moved to strike the amendment (R. 12, 121, 179, 195-6).

Defendant's Clopton Yard is the southern part of its Richmond, Virginia, yards (R. 140). There Sergeant J. L. Tiller received fatal injuries between seven and seven-fifteen P. M. on the night of March 20, 1940 (R. 31). Clopton Yard is not lighted (R. 31, 61, 99). The northern part of the

Richmond Yards lies on the north bank of James River and is known as Byrd Street Yard (R. 24, 37, 122).

Attached to our brief in opposition to the petition for the writ of certiorari is a blueprint of the pertinent part of Clopton Yard, which conforms to the testimony of all witnesses.

Classification of Richmond cars for the south is begun at Byrd Street Yard, and, if not there completed, is completed at Clopton Yard (R. 132, 135). The Richmond cars are carried each evening to Clopton by a yard engine and crew (R. 24, 37, 122). It is not unusual for final classification of these cars to be made at Clopton (R. 66). Also, each evening the road engine of the through freight known as "First 209" brings to Clopton cars from north of Richmond, which have been assembled north of the city in the Acca Yards of the R. F. & P. R. R. Co. (R. 23-24). When both of these cuts of cars reach Clopton, the through cars for the fast freight "First 209" are assembled or classified with Weldon cars immediately behind the engine, then Petersburg cars, and finally cars for Rocky Mount and beyond (R. 39). In classifying at Clopton, sometimes one set of tracks is used, sometimes another, as convenience and the particular classification to be made may determine; sometimes this requires more moves than are required on other occasions (R. 40, 43, 64, 78-79, 103, 107, etc.).

Sergeant Tiller had been a member of defendant's police force for sixteen years (R. 16). Policemen protect the trains and merchandise (R. 145, 147, 150) and in order more efficiently to guard against theft, they are cautioned against falling into a routine (R. 147, 151), and they avoid riding on the same place of trains (R. 144, 146). They know that the operators do not know where they may be in a yard (R. 29, 86); that no special warning can be or is given them of the movement of trains (R. 144, 147, 151); and that they must watch out for their own safety (R. 144, 147).

For a number of years Tiller had been regularly assigned to this fast freight "First 209" (R. 145, 150, 164), and he

was assigned to it on March 20, 1940. He followed no set practice in catching his train at any particular point,—sometimes he caught it at Acca, sometimes at Byrd Street, sometimes at Clopton (R. 86, 141). On March 20, 1940, it is assumed he caught it at Byrd Street, for he was seen there shortly before the Byrd Street cut left that yard, and he was not seen again until after he was injured (R. 69, 185).

Sergeant Tiller followed no routine in doing his work (R. 86). At times he was seen checking seals "at various places from Byrd Street down to the south end of Clopton Yard" (R. 86 and in Byrd Street Yard (R. 147). He had been seen inspecting seals "all over the yard", "south of the crossover switch", "at the south end of the yard", "north of Clopton Road" (R. 141). Another witness, who off and on for ten or twelve years had seen Mr. Tiller about his work, said: " \* \* \* there was no specific place for him to be. I might see him in No. 5 track to-night and a little later I might see him around No. 2 track, just going around about" (R. 164). Another says: "I have seen him everywhere" (R. 178).

Only one witness gave any testimony suggesting that Mr. Tiller had developed any habit. Switchman Waymack said that when Tiller rode the cut of cars from Byrd Street, he generally got off on the west side, some place between a point 15 car lengths (about 600 feet) north of Clopton Road and the switches south of it, and walked to the rear or northwardly. But Waymack also said that Tiller followed no regular routine, that he came to Clopton Yard in different ways, and that he had seen him doing his work all the way from Byrd Street to Clopton (R. 85-86).

On the night in question, the road engine, as usual, came into Clopton on the old belt line tracks from Acca (R. 25). It brought with it three hopper cars (R. 26, 38, 124) for Petersburg, behind which were twelve cars for Rocky Mount or beyond (R. 124). The yard engine, operating in reverse and pulling its cars, brought fifty-three cars to Clopton from Byrd Street, using the track marked "south bound

main line" (R. 69-70). Immediately north of the yard engine were fifteen local cars which were to go south later in the evening on the local freight; next was one Petersburg car; then a Rocky Mount car; then six Petersburg cars; and finally thirty Rocky Mount cars (R. 123). Neither engine had Weldon cars.

A yardmaster of forty years' experience was on duty that evening at Clopton (R. 122). When he reached the yard by automobile, bringing with him the consist of the cars which were to come from Byrd Street (which consist showed the above arrangement) (R. 124), the road engine had arrived (R. 125) and was standing on the old belt line, north of Clopton Road by the yard office, marked "A" on the blueprint (R. 25, 56, 125).

He directed the road crew to cut behind the three Petersburg hopper cars, to proceed south across Clopton Road and through the switch marked "B" (which is about 200 feet south of Clopton Road) (R. 89, 126) on to "slow-siding," or track No. 1; then to back north on slow-siding, through switch "B", sufficiently far to clear that switch so as to permit the yard engine to push its Rocky Mount car, which was between its Petersburg cars, up to point "A", and leave it attached to the twelve Rocky Mount cars left there by the road engine (R. 56, 68, 126).

As the road crew began this movement, the yard engine was coming into Clopton on southbound main line (R. 37, 70, 127). It stopped about 22 car lengths—880 feet—south of Clopton Road (R. 76, 127), so that its seventeenth car, i. e. the Rocky Mount car between the Petersburg cars, was approximately opposite the switch point "B", and so that Clopton Road was blocked by the cars behind it (R. 37, 62).

The yardmaster directed the yard crew to cut behind this seventeenth car, proceed with the seventeen cars to which it was to hold, south of switch "C", then pushing north through switches "C" and "B", to place this seventeenth car with the twelve Rocky Mount cars left by the road engine at "A" (R. 76, 127).

Thereafter, the yard engine, with sixteen cars (the sixteenth being a Petersburg car) was to proceed south through "B" and "C" to the south bound main line, then north so as to attach this Petersburg car to the cut it had left on south bound main line. It was then to proceed south with its fifteen local cars to a storage track at the south end of the yard (R. 128).

Thus would the yard engine have completed the classification of "First 209", which would then be in three parts. The engine and three Petersburg hopper cars on slow siding north of switch "B"; seven Petersburg cars followed by thirty Rocky Mount cars on south bound main line north of switch "C", and thirteen Rocky Mount cars on the old belt line at "A".

As the yard engine backed out of the old belt line preparatory to placing the one Petersburg car with the cut it had left on south bound main line, the road engine with the three Petersburg hopper cars was to follow through "B" and "C"; then to back north on south bound main line to pick up its cars, which the yard engine had classified. With these cars, it was to go south so as to clear switch "C", then go north through switches "C" and "B" to get the cars at "A", which the yard engine had classified for it. It was then to proceed on its journey (R. 129).

This plan was the most expeditious of the several possible plans, one was no safer than the other, and any possible plan would have required that at some point the road engine back, pushing ahead of it the three Petersburg hopper cars (R. 129-131, 138).

In our brief before the Circuit Court of Appeals, we made an extended detailed statement of fact, the accuracy of which was questioned by plaintiff in only one major and two very minor respects. We said that as the road engine backed north on slow-siding, pushing the three hopper cars in front of it, the cars from Byrd Street were standing still on south-bound main line across Clopton Road, and we said there was no evidence to the contrary. This is a major point, for

if our statement be accurate, the plaintiff's theory that Tiller was standing on or near slow-siding watching cars *moving* on south bound main line is exploded.

In her brief before the Circuit Court, the plaintiff said: "there is at least some conflict in the evidence relating to this inquiry".

Six, and only six, of the witnesses were in position to know—Myrick, the road engineer, Dickens, the road brakeman, Waymack, the yard trainman, Wright, the road fireman, Jones, the yardmaster, and Crews, the car inspector.

Engineer Myrick testified (R. 38):

"Q. And, as I understand it, when you were backing up, these cars were then in four sections? You had left one section up here on the hill? A. That is right.

Q. You had with you three hopper cars that you were backing into slow siding? A. That is right.

Q. The south end of the cars from Byrd Street was being pulled by the yard engine on down to the south end of the yard? A. That is right.

Q. The north end of the cars from Byrd Street, which were astride Clopton Road, were standing still? A. Yes, sir."

Brakeman Dickens testified (R. 62):

"Q. So that Clopton Road was protected from west-bound traffic or traffic from the east by the cars of First 209 which were standing on Clopton Road?

A. Yes, sir."

Trainman Waymack made the cut in the cars from Byrd Street. He testified that as the yard engine with the seventeen cars pulled south, leaving cars astride Clopton Road, the road engine was beginning to back into slow-siding (R. 77-8).

On cross-examination, Wright, fireman of the road engine, indicated that as the road engine backed, cars were standing still on south bound main line across Clopton Road (R. 103). At his request, he returned to the stand to make it clear that

he did not remember whether the cars were or were not moving (R. 120).

Car Inspector Crews was walking between the two trains as the road engine backed, but he did not recall whether or not the cars from Byrd Street were standing still (R. 176-7).

It is the testimony of Yardmaster Jones that petitioner quoted when she said there was conflict. Mr. Jones' testimony is not clear. He first says (R. 127): "The movement of the two trains was simultaneously". Again (R. 127): "At the time the cut was made I don't know definitely. I can't say". Then in the very same answer (R. 127-8): "I am inclined to believe that Mr. Myrick was moving backward. I know he was moving backward at the time the train arrived from Byrd Street but where Myrick was at the identical moment that Waymack cut that car loose, I am not clear". Finally (R. 128):

"Q. In other words, you can't give us any definite testimony on that matter?

"A. No, sir."

The road engine carried no headlight on the rear of its tender (R. 31) of a kind required by Rule 131 of the Interstate Commerce Commission (R. 22) to be carried by "each locomotive used in yard service". The road engine of "First 209" was not "regularly required to run backward for any portion of its trip" (R. 64), and it was not equipped with a rear headlight of a kind required by Rule 129 (R. 21) of a locomotive "used in road service" which is "regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train or in making terminal movements". The ends of the hopper cars which the road engine pushed into slow-siding were materially higher than a headlight mounted on the tender would have been (R. 172-4). Hence, a headlight on the rear of the tender, as stated by the Circuit Court of Appeals, "would not have illuminated the area ahead of the cars". (R. 205).

As the road engine backed the three hopper cars into slow-siding, at a rate of four or five miles an hour, its bell was ringing (R. 28, 104). As the lead end of the lead car of the back-up movement passed switch "B", brakeman Dickens got on that lead end (R. 27, 58), so as to protect the highway crossing from traffic approaching from the west (R. 62, 64). He held in his hand a lighted lantern with which he signalled the engineer backward (R. 27, 58, 63), and he alighted about the middle of Clopton Road (R. 28, 58, 63). He then waited to see that the road engine cleared switch "B" (R. 58), and gave the stop signal (R. 29, 58). When it stopped, the road engine was south of Clopton Road (R. 41).

Just after the road engine stopped, a beam of light was seen on the ground between slow-siding and south bound main line, a few feet north of Clopton Road (R. 30, 99). This turned out to be Tiller's flashlight. About a car length further north his cap was found, then another car length his pistol, broken or open or "unbreached", and, caught between the brake shoe and wheel at the lead end of the lead hopper car, Tiller himself (R. 30-31).

There is nothing in this present record which shows what Tiller was doing or at what point he was hit. In its opinion, when this case was formerly before it, the Supreme Court said:

"Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track."

This was virtually the statement made by the Circuit Court of Appeals in the first appeal to it. That Court on that occasion added:

"He was struck a short distance north of Clopton Road by the backup movement of the cars from Acca Station on the slow siding."

There was in the record on the first appeal, over the objection of defendant, an unexplained report made by defendant's Superintendent of Transportation to the Virginia State Corporation Commission, which report was admitted in evidence on the second trial as Plaintiff's Exhibit No. 3 (R. 193-195). The pertinent part of the report reads as follows:

"J. L. Tiller \* \* went with yard engine taking out of cars to Clepton, Va., to be placed in freight train stepped off engine upon arrival and was looking over the cars as they passed. He was standing on adjoining track for this purpose when road engine with several cars ahead of engine backed into this track. He was struck by the first car and dragged several feet receiving injuries which resulted in death \* \* \*".

On the first trial, and at the conclusion of plaintiff's testimony, the District Court sustained defendant's motion for a directed verdict. Hence, there was neither opportunity nor necessity for defendant to present the documentary evidence which showed this report to be a figment of the imagination of the clerk who prepared it. On the second trial, it was admitted over objection (R. 22, 196), and proof that it was purely imaginary was also introduced.

The Superintendent of Transportation, who signed the report, testified that it was made up in his office in Savannah, Georgia, by J. M. Parrish, one of his clerks, and that he knew nothing of the facts of the accident (R. 48-49).

J. M. Parrish testified at length. He had no personal knowledge of the matter (R. 153). He derived his information from a telegraphic report sent from Rocky Mount, North Carolina, by R. G. Murchison, Superintendent, on March 20, 1940 (R. 153-5); from a copy of a letter of April 4, 1940, from Mr. Murchison (R. 155-6); and from a report of April 9, 1940, from R. W. Wilbourne, Conductor, and W. M. Myrick, Engineer, of "First 209" (R. 157-9). This was all the data he had (R. 159, 161). The report required by 45

U. S. C. A. 38 to be made to the Interstate Commerce Commission was made up from this data (R. 160, 162); that to the Virginia Commission was made up a few days later from memory, reference being made to the I. C. C. report for times and dates only (R. 162).

The telegraphic report of March 26 from Superintendent Murchison, after describing the movement of the trains, says:

“ \* \* \* apparently Mr. Tiller standing on slow siding watching 62 cars being handled by yard engine passing on main line was backed over by INT Car 5168 being handled by Engine 1635 backing into slow siding no witnesses \* \* \* ”. (R. 155)

The copy of the letter of April 4, 1940, from Mr. Murchison says in part:

“ The inference is that Mr. Tiller stepped down from the cars being handled by the yard engine into the path of road engine shoving into the slow siding ”. (R. 156)

The report of April 9, 1940, from Messrs. Wilbourne and Myrick says in part:

“ State fully *cause* of accident. Not known ” (R. 158)

“ It is assumed that Mr. Tiller got off cars yard engine brought to Clopton for us to pick up and backed into the cars we were backing into side track to clear for yard engine to make a switch to our train which was standing on old branch line ”. (R. 159).

The evidence heretofore set forth conclusively shows that no cars were moving on southbound main line from a point 200 feet south of Clopton Road to a point far north thereof. Tiller was, therefore, not inspecting seals of passing cars.

The evidence furthermore shows that he was not holding a *lighted* flashlight. As the road engine backed north

on slow siding, Wright, its fireman, was sitting on the east side of the cab, looking north up the area between his cars and the standing cars from Byrd Street. He had an unobstructed view. He saw no light or beam of light around Clopton Road, or immediately north of it (R. 103).

Waymack, switchman of the yard crew, after making the cut on those cars, stepped across southbound main line preparatory to going up on the hill (R. 77). This caused him to face north up the area between slow siding and southbound main line; he saw no beam of a flashlight around Clopton Road (R. 78).

It is certain that Tiller was struck some place between the switch 200 feet south of Clopton Road, and the point where his flashlight was found, 4 to 6 feet north of Clopton Road. Dickens, the brakeman, was riding the lead end of the back-up movement, either when Tiller was struck or up to a point within a few feet of the place he was struck. He saw no light or person (R. 63). His testimony on this point is, however, not strong, for he was watching for traffic coming east on Clopton Road (R. 63).

Finally, Crews, the car inspector, crossed slow siding on foot at Clopton Road after the back-up movement had begun (R. 176). He was then within a few feet of the spot where the flashlight was found. He neither saw there a person nor any sign of a flashlight (R. 177).

This, together with what we have heretofore pointed out, is every item of evidence or scintilla of evidence throwing any light on the question—"Where was Tiller when he was struck, and what was he doing?" If the flashlight was in his hand when he was struck, he probably dropped it instantly. But, there is no evidence that it was in his hand. No inference can be drawn from the fact that it was lighted when found, for the fall may have lighted it, just as the fall of his pistol opened or broke it. If the flashlight was in his pocket when he was struck, he may have been dragged some distance before it fell out, just as he was dragged some distance before his cap or his pistol fell.

There is no evidence tending to show whether Tiller was standing on slow siding and was not aware of the approach of the back-up movement; whether he was trying to cross slow siding and slipped; whether he was walking between slow siding and southbound main line, as Crews was walking, and slipped; whether he stepped off cars from Byrd Street or slipped or fell therefrom under the back-up movement; whether he was trying to swing on the back-up movement to look for trespassers in the hopper car, and slipped; etc.

Plaintiff has contended vigorously that the back-up movement of the road engine into slow siding was unusual, "unprecedented and unexpected" (R. 8). The Circuit Court of Appeals found that the evidence showed the same movement had been made on other occasions, and that slow siding was in general use both for back-up movements and other purposes. The record contains much evidence on this subject from fourteen witnesses.

When this case was first tried, Myrick, engineer of the road engine, testified that before Tiller's death only occasionally was he in Clopton Yard; and that for two or three years prior thereto he had been in Clopton only two or three times a month (R. 44). On the second trial, he testified on direct examination that from 1924, he had been in Clopton five or six times a month (R. 32). On cross-examination he said four to six times a month (R. 42), and was then confronted with his original testimony (R. 44). On redirect, he came down to three or four times a month (R. 45). He testified that he had never before backed into slow siding (R. 32, 47). He also testified that one night one set of tracks is used, another, another (R. 43).

Dickens, brakeman of the road crew, testified that in his years with the road, he had been in Clopton as a member of the road crew approximately forty times (R. 59), and that he had seen the road engine make the back-up move into slow siding, but he did not know how many times (R. 60). Prior to Tiller's death, he had been in Clopton

twelve to twenty times, but had never seen that movement made (R. 60). He stated that it was not unusual to use any track in Clopton (R. 64, 65).

Switchman Waymack, of the yard crew, had been in Clopton about half the time for twenty-four years (R. 71). On the former trial, he said that the exact movement made by road engineer Myrick was not unusual; that "it may happen ten times a month or it may happen fifteen times per month or it may not happen in two months" (R. 81, 82). On the occasion of the recent trial, he became very much confused; for instance, on direct examination: "They seldom ever backed down there if they have anywhere else to go" (R. 72). On cross-examination, he answers "Yes" to the question "You have seen on a number of occasions the road engine back into slow siding" (R. 79)? On redirect: "The usual move of the road engine is to go down in No. 1" etc. (R. 80). He very clearly got mixed up on the words "unusual" and "usual" (R. 79, 80, 82). His testimony is to be found on pages 71-2, 78-85 of the Record.

Fireman Wright of the road crew had been in Clopton Yard twelve or fifteen times. He had never seen this move made (R. 102).

C. D. Huband, a man of much experience in Clopton Yard (R. 87), said on direct examination that the move made by the road engine was not a usual move (R. 89) but was "very unusual" (R. 90). But on cross-examination, he said he had "many times" seen a road engine backing up slow siding to get to the water tank located thereon, and that he had seen a road engine so backing "on other occasions" (R. 97).

C. L. Parrish, who got into Clopton Yard two or three times a month (R. 106), said, so far as he could recall, he had never made such a back-up movement into slow siding (R. 107). He also said that on different nights the road engine got out of the way so the yard engine could classify the train, by going into different tracks (R. 107).

E. B. Orebaugh says that he always got in the clear by dropping into No. 1 track (R. 111). He had been employed

for three and one-half years, and had been in Clopton four or five times a month (R. 110). On cross-examination, he recalled occasions when he had backed into slow siding, and stated there was nothing unusual about using any track at Clopton (R. 111-2).

W. C. Moore, an engineer of long experience in Clopton, said he did not recall any occasion when he was engineer assigned to "First 209" that he had gotten into the clear out of the way of the yard engine by backing into slow siding (R. 114, 117); that he had gotten into the clear by dropping south into No. 1 (R. 114). But it developed that if the road engine with cars drops into the clear by going into No. 1, it then has frequently to back out into slow siding (R. 115). Mr. Moore had seen other engines pushing cars, backing on slow siding, and on all the other tracks (R. 116).

Yardmaster Jones said that "time and again" he had seen this move made (R. 131).

Sergeants Angle (R. 144-5), Ferguson (R. 146-7) and English (R. 150) all had seen this move made on other occasions.

Car Inspector Crews, whose twenty-one years of service have been spent exclusively in the Richmond Yards (R. 175), was asked whether he had seen the road engine with cars attached thereto get into the clear by backing into slow siding. He replied: "Yes, sir. It happens real often". (R. 177).

Save for the fact that virtually every one of these witnesses and others said that in Clopton, every track is used one time or another, the above is all the evidence bearing on the alleged unusual movement.

Not a line of evidence was introduced to show for what class of employee this custom of not backing into slow siding, if it existed, did exist; or whether or not, if it existed, it arose for the protection of the general public traveling Clopton Road.

The plaintiff called to the stand eight practical railroad operators—engineers, firemen, conductors, brakemen and

switchmen. We asked seven of them the question whether the move made by the road engine with the three hopper cars from old belt line into No. 1 track, and then back into slow siding, was a use of the road engine in yard or road service—or a movement made in yard or road service. Each replied that it was a use or movement in road service (R. 40, 64, 79, 97, 104, 108, 117). On cross-examination of defendant's witness, Yardmaster Jones, the question was put to him. He answered, road service (R. 142). The question was put to no other witness.

The line of demarcation, which was drawn by these men between the two types of service, was the line which divides "classifying" or "switching"—which in railroad parlance are movements in yard service, from other movements which are movements in road service. It is clear from their testimony that if an engine takes a car from one point in a yard, carries it to another and leaves it, then it is classifying or switching, and is being used in yard service. If, on the other hand, an engine moves "light", that is, the engine and tender alone, or with one or more cars to which it holds, so as to get out of the way in order to permit another engine to switch a car, then the former engine is being used in road service.

Plaintiff's witness Moore was one of the most intelligent of the witnesses, and in his redirect and recross examination (R. 117-9) this matter is more fully developed than at any other point. He said: " \* \* \* in making that move the road crew is simply getting out of the way of the yard engine to do the switching". " 'Switching' is classifying cars, switching one out from between the other, and so on and so forth". Again on redirect examination:

"Q. Then if he cut off three cars on the hill and brought them down for the purpose of making a classification, was he doing the same thing that the yard engine would do if it cut off and carried a few cars down to back into a track?

A. Did he leave them there or bring them out with him?

Q. Did he leave them there?

A. When he backed into the clear, did he leave those cars?

Q. Assume that after some other cars had been put to his train he brought them out and then switched them back to his train.

A. I see no difference there whether he had cars or a light engine. He was simply getting out of the way with what was necessary to hold to."

On recross:

"Q. \* \* \* does an engine which simply takes with it certain cars, in order to clear the way for another engine to classify the train and then the first engine which had gotten into the clear brings its cars back, engage in shifting work?

A. No, sir.

Q. And is not engaged in shifting work whether its primary purpose for being there is road purpose or yard purpose, is it?

A. No, sir. *It would be impossible for the switch engine to do this switching with the road engine attached to the train. He has got to get out of the way.*" (Italics supplied).

The same thought came out in plaintiff's cross-examination of Yardmaster Jones (R. 142):

"Q. In other words, if they had, besides backing up the three cars—the road engine—had left those three cars there in slow siding and had slipped on up the hill and helped the yard engine in making up the train by putting the Florida car in the right place, they would have gone over the line, so to speak and would have been entitled to yard service?

A. Yes."

Engineer Myrick (R. 41) and Brakeman Dickens (R. 67, 68) also make it clear that a movement of an engine and

cars to clear the way for another engine to shift, is a road movement, but if an engine sets off a car and leaves it, the movement is in yard service (R. 41, 66).

It even appears that this test is adopted in the agreement between the company and the Unions. It is brought out clearly by Dickens (R. 66) and by Yardmaster Jones (R. 142) that if members of a road crew do any switching or yard work, they are entitled not only to road pay but also to a full day's yard pay. But all witnesses who mention the matter are agreed that nothing was here done which entitled the road crew to yard pay. The same thought is touched on by Waymack (R. 79) and cryptically by Huband, who said (R. 97): "It is a movement in road service to avoid paying a yard crew day".

Perhaps Dickens (R. 64), Wright (R. 104) and Parrish (R. 108) covered the subject in a word. Dickens said: "It was road service made within the yard".

All through this litigation plaintiff has claimed that an unlighted yard is a badge of negligence. A stipulation, hereafter referred to, (R. 149) fully covers the extent to which the practice of lighting has gone. Only some of the largest yards are lighted. Some smaller yards in which a shop or warehouse is located, have outside lights for the purposes of the shop or warehouse. No yard of the size and character of Clopton is lighted.

The experience and views of the men who have to work in the yards is instructive. Generally those who have to work much of the time on the ground, such as brakemen and switchmen, find the overhead lights confusing; those who stay mostly on the equipment like overhead lights. Two engineers, Myrick (R. 42) and Moore (R. 116) like the lighted yards. A fireman, Wright, (R. 104-5) does not like them. He finds at certain points they blind, and make signals more difficult to read. Parrish, a conductor, likes them (R. 108). Huband, a conductor, has had little experience in lighted yards (R. 94). He summarizes much of the pros and cons by saying that in a lighted yard you can see a person

further, but the signals are harder to read (R. 95). Orebaugh, a conductor, likes them in some yards, not in others (R. 112). King, a switchman, (R. 168) and Elkie, a conductor, (R. 165) do not like them because of difficulty in reading signals. Dickens and Waymack, a brakeman and switchman, respectively, do not like the overhead lights (R. 62, 85). They blind at points (R. 65), and in moving from a darker point to a brighter one, it takes the eyes a few moments to adjust themselves. The last point is the reason Linton, an engineer, does not like lighted yards (R. 164).

Three of these men find lights help; six find they hinder; two are noncommittal.

Switchman Waymack had a recollection of a bulletin promulgated by the company which required that a train approaching an *unprotected* public crossing must come to a full stop, and some person must from the road then flag the train across (R. 72-73). On cross-examination, however, he testified that the bulletin has no application to a crossing already blocked by a standing train, and did not require, under the circumstances existing in the instant case, that the road engine stop and wait to be flagged over Clopton Road (R. 75-6).

Conductor Huband testified to a rule, somewhat similar (R. 90-1). This turned out to be Rule 103 from the company's Rule Book reading as follows (R. 96):

“When cars are pushed by an engine, except in shifting or making up trains in yards, a trainman must take a conspicuous position in the front of the leading car and when shifting over public crossings at grade, not protected by a watchman, a member of the crew must protect the crossing”.

Huband testified that if the road crossing was blocked by cars standing on one track, and an engine on another track was about to push cars over the crossing, and a brakeman with a lantern was riding on the lead end of the back-up movement, proper protection is given. He says it is “a

proper move" and "He had properly taken care of that crossing" (R. 96).

Plaintiff introduced Rule 24 from the company's Rule Book reading as follows (R. 101):

"When cars are pushed by an engine, except when shifting or making up trains in a yard, a white light must be displayed on the front end of the leading car by night."

The Rule Book contains a demonstrative diagram (R. 101) showing a lantern sitting on the end of the walkway which runs on top a box car, from end to end. On a hopper car which is open, there is no top or walkway, there is only a three-inch flange.

Dickens, with a lantern, was on the lead end.

The stipulation (R. 150) shows the practical construction placed on this rule—it applies to main line operations alone. The stipulation provides in part:

"When cars are thus pushed" (i. e. in yards), "it is not the practice of the railroads to place on the lead end of the movement a headlight similar to that carried by a locomotive, or otherwise to light the lead end of the back-up movement. Sometimes for some special purpose a man carrying a lantern may ride on the lead end of the movement."

Plaintiff introduced evidence from a section foreman showing that the clearance between tracks in Clopton Yard is 7' 11½"; that if ordinary freight cars are on each track, the distance between them is 4' 3½"; and a hopper car projects out 4" more than does an ordinary car (R. 50). On cross-examination, it was shown that this clearance was standard to the Coast Line system (R. 52).

The parties entered into a stipulation (R. 148-50) which sets forth that in practice, while some of the largest railroad yards of the country are lighted by overhead lights, "no yard of the size and character of Clopton" is so lighted; that when cars are pushed by a locomotive in a yard at

night, no headlight or other light is placed on the lead end of the back-up movement; and a locomotive equipped with a headlight for road service, but not equipped for yard service, which brings cars into a yard, is permitted to make such movement as may be necessary or convenient to get the road engine and cars adjacent thereto out of the way, so that the yard engine may do the necessary classifying and switching work.

### QUESTIONS INVOLVED

Now that the writ of certiorari has been granted, the questions involved are:

1. Whether the plaintiff should have been permitted to amend her complaint more than three years after the cause of action arose, by alleging a violation of the Boiler Inspection Act.
2. Whether there was sufficient evidence to support a verdict in favor of plaintiff, and hence whether the motions of defendant for a directed verdict and for judgment notwithstanding the verdict should have been sustained.
3. Whether there was sufficient evidence of common law negligence (other than evidence of an unprecedented movement) to permit that question to go to the jury.
4. Whether there was any evidence tending to show that an act of common law negligence, if any, had causal connection with the injuries and death of Tiller.
5. Whether there was any evidence of a violation of the Boiler Inspection Act.
6. Whether there was any evidence tending to show that a violation of the Boiler Inspection Act, if any, had causal connection with the injuries and death of Tiller.
7. Whether Plaintiff's Exhibit No. 3 (R. 193-4), the report to the Virginia State Corporation Commission, should have been admitted in evidence.
8. Whether there was sufficient evidence of an unexpected or unprecedented movement, or departure from a general

practice in moving cars, to demand that a special warning of the movement be given Tiller.

9. If such warning was required, whether, as a matter of law, it was not given.

10. Whether, if there was sufficient evidence to take the question of an unexpected or unprecedented movement to the jury, the District Court correctly charged the jury on that phase of the case, and whether it should not have included in the charge that the alleged custom must have been established for the benefit of that class of employee to which decedent belonged.

11. Whether the District Court should not have charged that the road engine was engaged in "road service" and not in "yard service".

12. Whether the District Court should not have charged that no applicable statute or regulation imposed on defendant the duty to place a light of any kind on the lead end of a car or cars that are being pushed by a locomotive in a yard in the nighttime.

13. Whether the District Court should not have charged that such matters as the clearance between tracks and other engineering questions are left to the decision of the railroad and are not reviewable by the jury.

14. Whether the jury should have been instructed to disregard defendant's Rule 103.

15. Whether the jury should have been instructed to disregard defendant's Rule 24.

16. If one or more of several issues is erroneously submitted to the jury, whether a general verdict can be sustained.

The District Court decided the first fifteen questions against defendant. It did not have the sixteenth before it. The Circuit Court of Appeals decided questions numbered 6, 8 and 16 in favor of defendant; it did not pass upon those numbered 1, 5, 9 and 11; the other questions it decided against defendant.

## ARGUMENT

### *1. The Amendment of the Complaint should not have been Permitted.*

We have pointed out that the amendment was made more than three years after the cause of action arose. The amendment asserted a new cause of action, which could not be injected after the lapse of three years. Of this point, the Circuit Court of Appeals said:

“We do not need to consider this question in the view we take of the subsequent developments of the case.”

#### *a. The Amendment Asserts a New Cause of Action*

Prior to the New Federal Rules, an amendment which set up a new cause of action, a new or different state of facts, or sought a departure from law to law, did not relate back, and if the period of limitation had run, it was barred.

The fundamental authority of this question is *Union Pacific Railway Company v. Wyler*, 158 U. S. 285, 39 L. Ed. 983, 15 S. Ct. 877. That was an action for personal injuries sustained in Kansas. The original pleading alleged as negligence that the defendant employed a fellow servant known by it to be unfit and incompetent, and the action was brought in Missouri under the general law of master and servant. After the limitation period had run, it was sought to amend by pleading the negligence of the fellow servant under a Kansas Statute. The court declined to permit the amendment, saying (p. 295):

“A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow servant, then the averment of

negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas Statute, it was a departure from law to law".

This case has been followed in many decisions, or it has been distinguished, so that it is safe to say that if an amendment merely expands or amplifies what was alleged in support of the cause of action first asserted, it relates back to the commencement of the action and is not affected by the intervening lapse of time. But if it introduces a new or different cause of action, or new and additional occurrences, it is the equivalent of a new suit as to which the running of the limitation is not arrested (*S. A. L. Ry. Co. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 S. Ct. 567; *Missouri etc. Ry Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 S. Ct. 135; *N. Y. Central R. Co. v. Kinney*, 260 U. S. 340, 67 L. Ed. 299, 43 S. Ct. 123).

A number of the earlier decisions are gathered up in *B. & O. S. W. R. Co. v. Carroll*, 280 U. S. 491, 74 L. Ed. 566, 50 S. Ct. 182. There, suit was brought by an injured employee on the theory that the state law applied, and he recovered. The appellate court, however, reversed the case, holding that the federal law applied. While appeal was pending, the employee died and, after the period of limitation had run, it was sought to amend so as to recover not only for loss and injury sustained by the employee during his lifetime, but also for loss resulting from his death. On the trial of the case these two separate matters went to the jury, which rendered a single verdict. On appeal this verdict was set aside. The Supreme Court made reference to the *Wulf* and the *Kinney Cases*, *supra*, as follows (p. 494):

"Each of these decisions proceeds upon the ground that the amendment did not set up any different state

of facts as the ground of action, and therefore it related back to the beginning of the action. In the *Kinney* case, it was pointed out that the original declaration was consistent with the wrong under either state or federal law, as the facts might turn out; and that the acts constituting the tort were the same, which ever law gave them that effect.

"But here two distinct causes of action are involved, one for the loss and suffering of the injured person while he lived, and another for the pecuniary loss to the beneficiaries named in the act as a result of his death".

It will not be inappropriate again to point out that in the instant case the original complaint is consistent with a wrong under the Federal Employers' Liability Act only, whereas in the amendment new and additional facts are sought to be brought in, in order to allege a case under the Boiler Inspection Act.

A pertinent case is *Clark v. Gulf, etc. R. Co.*, 132 Miss. 627, 97 S 185. Mississippi had a statute which made proof of injury inflicted by the running of cars, etc., *prima facie* evidence of want of reasonable skill and care, and in an earlier Mississippi case it had been held that it was not necessary to allege negligence. In the *Clark* case the original pleading did not allege negligence, and it was sought to amend by alleging an act of negligence. This amendment was not permitted. The instant case presents the reverse picture. The original complaint alleges specific acts of negligence, and it is sought to amend by alleging a mandatory, statutory duty which has no reference to negligence.

Rule 15 (c) of the New Federal Rules gathered these old principles together in broad and liberal fashion as follows:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Cases decided under the new rules demonstrate that this rule is primarily a codification of the old law, although whether there be "a departure from law to law" is now relatively unimportant, the vital question still being whether the amendment seeks to allege a new state of facts. Instructive of these views are the following cases:

In *L. E. Whitham Construction Co. v. Remer*, 105 F. (2d) 371, plaintiff was severely injured by a blast of dynamite when drilling a hole in rock and died a few hours thereafter. Suit was brought by his administrator for the benefit of his wife under an Oklahoma Statute. Another statute provided that action should survive to the administrator for the benefit of the estate. After the two-year limitation had expired the complaint was amended and a second count was added claiming funeral expenses and a third count for the suffering of the deceased up to the time of his death. The Circuit Court of Appeals held that the allowance of the amendments was error.

The court discussed Rule 15 (c) and said:

"Counsel for plaintiff contend that under this rule the amendment which added the second and third causes of action to the petition relates back to the date of the filing of the original petition. We are of the opinion that the rule is not applicable where the amendment introduces a different and additional claim or cause of action.

"Here, the original cause of action was brought by plaintiff as administrator for the benefit of the surviving wife, while the second and third causes of action were brought by the administrator for the benefit of Remer's estate. It follows that the second and third causes of action were barred by the statute of limitations."

In *Michelson v. Penney*, 135 F. (2d) 409, it is clearly brought out that Rule 15 (c) is, in effect, declaratory of the law as it has long existed. There it is said (p. 417):

"The amended and supplementary complaint merely made specific what had already been alleged generally;

the cause of action was not changed; and relation back under Federal Rules of Civil Procedure, rule 15 (c), *and the earlier law it codifies, therefore followed*". (Italics supplied).

In *Schram v. Poole*, 97 F. (2d) 566, a receiver of an insolvent bank within the required time filed suit against a guardian to recover assessments against bank stock of the ward's estate. After the limitation period had run, he sought to amend in order to join the ward as a defendant. This the court decided to permit, saying (p. 572) :

"We think such an amendment would not relate back, however, but would be in effect the commencement of a new suit".

Rule 15 (c) is quoted in *Owen v. Paramount Pictures*, 41 F. Supp. 557, 561, and of it the court says:

"Under this rule, unless there is a *substantial change* from the claim as originally alleged (as in *L. E. Whitham Const. Co. v. Remer*, 10 Cir. 1939, 105 F. 2d 371) defendant cannot contend that he is taken by surprise or is prejudiced because he has known the facts from the beginning. The amendment will therefore relate back to the commencement of the action and is not barred by the statute". (Italics supplied)

A most instructive case is *Delaware & Hudson v. Jennings*, 64 F. (2d) 531, which antedates the New Rules. The plaintiffs alleged that they were injured some distance from a grade crossing while lawfully crossing defendant's tracks. The proof showed that they were injured at the crossing and the verdict in favor of plaintiff was set aside because of a variance. After the statutory period had run, the plaintiffs were permitted to amend by alleging that they were injured at the crossing and recovered. The defendant contended that the amended complaint set up a new cause of action, since the place of the accident was of primary

importance because it determined the degree of care to which the plaintiff was entitled, and, as the amendment changed the place, and changed the duty, it changed the action. With this contention, the appellate court agreed, saying (p. 533):

"As the plaintiffs by amendment set up a new ground of action and thereby charged the defendant with a new liability after the two year limitation, we are forced to hold they cannot prevail on the present pleadings and that, in consequence, the judgment in their favor must be reversed."

In *White v. Holland Furnace Co., Inc.*, 31 F. Supp. 32, the claim stated in the amendment was, according to the court, "based upon the same facts set forth in the original petition," and it accordingly permitted the amendment, saying,

"The emphasis of the courts has been shifted from a theory of law as the cause of action, to the specified conduct of the defendant upon which the plaintiff tries to enforce his claim. \* \* \* To give effect to Rule 15 (c) \* \* \*, the Court should allow an amendment of a pleading where the factual situation was not changed though a different theory of recovery is presented."

These principles are of easy application to the instant case. The cause of action or "specified conduct of the defendant" set up in the original complaint is acts of common law negligence. Under it, proof of negligence is required (*Delaware etc. R. R. v. Koske*, 279 U. S. 7, 73 L. Ed. 518, 49 S. Ct. 202; *Tiller v. A. C. L. R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967). The new cause of action, the new "specified conduct of the defendant", i. e. the violation of a statutory duty, requires no proof of negligence, for in relation to it the defendant stands in the position of an insurer (*Southern Ry. Co. v. Lunsford*, 297 U. S. 398, 80 L. Ed. 741, 56 S. Ct. 504; *Lilly v. Grand Trunk etc. R. Co.*, 317 U. S. 481, 87 L. Ed. 411, 63 S. Ct. 347, 45 U. S. C. A. 23, note 7).

It was pointed out in *B. & O. S. W. R. Co. v. Carroll, supra*, that the amendment related back only in the event the original pleading is broad enough to include not only the original, but also the new cause of action. Certainly one who confines his case to a claim for negligence under the Employers' Liability Act, does not allege a case covering the violation of a statutory duty under the Boiler Inspection Act.

*Delaware v. Hudson & Jennings, supra*, and *Clark v. Gulf etc. R. Co., supra*, are peculiarly apt. In the former, the amendment would have changed the degree of care to which plaintiff was entitled; it would have changed the duty resting on the defendant. In the latter, plaintiff did not allege negligence; he alleged the violation of a statutory duty, which raised a *prima facie* presumption in his favor. He could not amend by alleging negligence, for by so doing, he claimed a different right and asserted a different duty. Here, under the allegations of the original complaint, the plaintiff was entitled to and the defendant owed the duty of giving ordinary care. Under the amendment, plaintiff was entitled to absolute protection and the defendant had all the duties of an insurer.

If the cause of action be not changed, if the amendment be but an expansion or amplification of the original cause of action, not only is the degree of care and the duty the same, but the same general defenses are available. As a matter of defense, in mitigation of damages, to the original cause of action, the defendant had contributory negligence available. But the defense of contributory negligence is not available in a case arising out of the Safety Appliance Act, 45 U. S. C. A. 1, or the Boiler Inspection Act. (*Chicago, G. W. R. Co. v. Schendel*, 267 U. S. 287, 69 L. Ed. 614, 45 S. Ct. 302; *B. & O. R. Co. v. Groeger*, 266 U. S. 521, 69 L. Ed. 419, 45 S. Ct. 169).

The amendment alleges a new and different state of facts—i. e. failure to equip the locomotive with proper headlights,—not to have a light on the lead car of the back-up movement as alleged in the original complaint.

The amendment departs from law to law in substantive matters—from an action for violation of a common law duty to an action for a violation of a statutory duty imposed by the Boiler Inspection Act, each of which is brought under the jurisdictional and procedural provisions of the Employers' Liability Act.

In like manner, the amendment asserts a claim which arises out of *conduct*, transaction or occurrence not alleged in the original complaint.

Finally, on this phase, we call attention to *Maty v. Grasselli Chemical Co.*, 303 U. S. 197, 82 L. Ed. 745, 58 S. Ct. 507, wherein an amendment was allowed after the period of limitation had run. In the Court's opinion by Mr. Justice Black, there is given a test for this matter, which we believe to be about as accurate as can be stated. In speaking of the original and amended complaints, it was said:

“They referred to the same kind of employment, the same general place of employment, the same injury and the same negligence.”

Apply this test to the original and amended complaints in the instant case. They refer to the same employment; they refer to the same place of employment; and they refer to the same injury. But they do not refer to the same negligence. The former refers to alleged failures to do certain acts, or to refrain from doing certain acts, which a reasonable man (railroad) under similar circumstances would have done, or refrained from doing, as the case may be, and as to which the defendant had available to it the defense of contributing negligence, if negligence should be proved. The latter refers to an entirely different type of alleged wrong—a failure to perform a statutory duty, for which there is no defense of any kind. If “negligence” be a proper word to describe a dereliction of the type alleged in the amendment, the “negligence” there alleged is different in nature, degree and effect from that alleged in the original complaint.

*b. Suit on the New Cause of Action was Barred*

The Safety Appliance Act and the Boiler Inspection Act contain no procedural provisions. One desiring to sue for a violation of a statutory duty imposed by either of those acts may bring his action under the procedural provisions of the Employers' Liability Act (*Moore v. C. & O. R. Co.*, 291 U. S. 205, 78 L. Ed. 755, 54 S. Ct. 402; *Lilly v. Grand Trunk Western Ry. Co.*, *supra*). That is what plaintiff here seeks to do. But suit on such a cause of action must be brought within three years, for that is the limitation prescribed by the Act of August 11, 1939, c. 685, Sec. 2, amending section 56 (45 U. S. C. A. 56) of the Federal Employers' Liability Act.

The very jurisdiction of the Federal District Court depends on suit being brought within the prescribed time for the limitation is not simply one upon the remedy, but it goes to the very right of action itself. (*Bell v. Wabash R. Co.*, 58 F. (2d) 569; *A. C. L. R. R. Co. v. Burnett*, 239 U. S. 199, 60 L. Ed. 226, 36 S. Ct. 75; *Rademaker v. Flynn Export Co.*, 17 F. (2d) 15, *Flynn v. N. Y. N. H. & H. R. Co.*, 283 U. S. 53, 75 L. Ed. 837, 51 S. Ct. 357).

The limitation in a death case runs from the date of death and not from the date of the appointment of the personal representative. (*Reading Co. v. Koons*, 271 U. S. 58, 70 L. Ed. 835, 46 S. Ct. 405).

**2. The Verdict of the Jury and Judgment of the District Court were without Evidence to support Them.**

Under this heading, we discuss the questions numbered 2, 3, 4, 5, and 6, all of which relate to the sufficiency of the evidence. Our position is that there was not sufficient evidence to support a verdict, and hence our motions for a directed verdict and a judgment notwithstanding the verdict should have been sustained. Those motions went to the whole case. We also at the proper time divided them up into their component parts, i. e. the sufficiency of the evidence to estab-

lish negligence, or, if negligence existed, to establish causal connection; or to establish a violation of the Boiler Inspection Act, or, if such a violation existed, to establish causal connection.

Our argument on these matters is primarily the factual statement heretofore made. What remains to be said is divided into two parts—one relating to alleged acts of common law negligence, or the Employer's Liability Act phase of the case; the other relating to alleged violation of statutory duty, or the Boiler Inspection Act phase of the case. These, we discuss separately, for the evidence is different, the character of proof required of plaintiff is different and the defendant's duty was different.

*a. The Evidence does not establish Negligence or Proximate Cause*

The evidence in this case presents no real conflict. There can be no dispute over the movements of the trains; over the fact that the north end of the cut from Byrd Street was standing still while the road engine backed up slow siding; over the question whether Tiller was holding a lighted flashlight. Some say that a back-up movement by the road engine on slow siding was unusual, others that it was not unusual. But this really presents no conflict in the testimony, because such statements are but conclusions. Even on this feature, there is no conflict, for when the witnesses turned to facts, it quickly developed that most of them had seen slow siding so used, and all said that no routine was followed—on different nights different tracks were used. The question is, can any inference of negligence be drawn from the facts proved in evidence, or must certain additional facts be added by speculation and conjecture before that inference can be drawn?

The former decision of the Supreme Court in this case (*Tiller v. A. C. L. R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967) does not relieve one who alleges negligence from the duty of proving it. The latest

statement of the Supreme Court is that recovery cannot be had under the Employer's Liability Act, unless negligence be proved, and unless it be proved that such negligence is the proximate cause in whole or part of the accident, and the decision of the Supreme Court in this case is cited (*Tennant v. Peoria etc. R. Co.*, 321 U. S. 29, 88 L. Ed. 322, 324, 64 S. Ct. 392). And in its decision in the instant case, the Supreme Court reiterated the time honored statement that negligence is "the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done".

In many types of cases, the common experience of men furnishes the jury with a guide—they know, or are presumed to know, out of the book of human experience, what a reasonable man would do under circumstances known generally to men. But when those circumstances lie in the field of some technical endeavor, the jury has no guide from human experience, the plaintiff must by evidence prove what reasonable practices in that field may be, and thus having given to the jury a guide, it must be shown that the defendant violated it. We do not permit the jury to guess at the standard, anymore than we permit speculation on the question whether the standard has been breached. A doctor is charged with negligently performing an operation. We do not permit a plaintiff simply to show what the doctor did, and go to a jury on the gamble that they, as uninformed laymen, may think the doctor should have done otherwise. The plaintiff is required also to show what may be approved medical practices, and that the defendant's actions violated them.

The defendant here is engaged in an extremely technical line of business. Amid the circumstances of this case are the operation of a freight yard, the mysteries of railroad traffic, the operation of a great railroad system. The ordinary experiences of men furnish no guide by which they can test the reasonableness of many of these railroad prac-

tices. What should be the clearance between tracks? Should yards be lighted? Should trains be classified in this manner or that? These are questions which no jury can pass upon, unless they be furnished with evidence. That mythical person whom we term the "reasonable and prudent man" becomes in such case "the reasonable and prudent railroad" (*Sadowski v. Long I. R. Co.*, 41 N. Y. S. (2d) 611), and by evidence the jury must be introduced to him.

The Supreme Court has recently had occasion, in *Brady v. Southern R. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232, to comment on the necessity of a plaintiff making this introduction in a suit under the Employer's Liability Act. One of the specific charges of negligence was that the defendant railroad company had failed "to provide a light or other warning to indicate the dangerous position of the derailer", which was closed to prevent cars from drifting from a storage track on to the main line. No evidence of approved railroad practice in this respect was introduced. The trial court permitted the case to go to the jury which brought in a \$20,000.00 verdict. The Supreme Court of North Carolina reversed, because there was no evidence to support the verdict. In affirming that reversal, the Supreme Court of the United States said:

"As to the light, it is nowhere shown that it was customary or even desirable in the operation of this or any other railroad to equip derailleurs with such a signal. Apparently lights on a derailer are not used on storage tracks where, as at the place of the accident, an automatic block system functions."

*Beamer v. Virginian Ry. Co.*, 181 Va. 650, 26 S. E. (2d) 43, recently decided, was also a Liability Act Case. There the Court comments on the effect of expert testimony, and the defendant railroad having acted in accordance with approved practices, the action of the trial court in setting aside a verdict against it and entering judgment, was affirmed.

Other cases commenting on the necessity of showing approved practices are *Delaware, etc. R. Co. v. Koske*, 279 U. S. 7, 73 L. Ed. 578, 49 S. Ct. 202; *Sadowski v. Long I. R. Co., supra*.

We point out that the plaintiff introduced not a line of evidence to show what is "customary or even desirable" in Clopton Yard or any other yard of this or any other railroad. The only evidence on this subject is the stipulation (R. 148, *et seq.*) introduced by defendant, showing some of the practices of the great roads in the southeast. It is not even contended that defendant violated a single one of those practices.

The amended complaint asserts six specific acts of negligence. We list them, with brief comment.

(1) *Failure to keep a proper lookout.* Admittedly, brakeman Dickens was on the lead end of the movement, giving the back-up signal—a circular movement—with a lighted lantern. We do not mean to intimate that he was there for the purpose of maintaining a lookout for men working in the yard, for he says his only reason for riding the car was to warn highway traffic approaching from the west. Be the reason what it may, he was there, with his lantern, for all men to see.

Again, there is no evidence here tending to show whether it is reasonable to expect that on the millions of back-up movements which take place in the yards (mostly unlighted) of this country, there be posted a special lookout. Is it "customary or even desirable in the operation of this or any other railroad" to place a lookout for the men working in the yards of the country—for men who know that tracks are in continuous use? What are approved railroad practices? The evidence is silent.

(2) *Failure to give proper signals of the approach of the cars.* Both the engineer and the fireman, who were operating the road engine—witnesses for the plaintiff—testify that the automatic bell was ringing. No witness contradicts them. There is not a scintilla of evidence that "it is cus-

tomary or even desirable" that another type of warning be given. And finally, no duty rests upon a railroad to give warning to men working in a yard that cars are being moved, because this but adds to the confusion. (*Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758, 12 S. Ct. 835).

(3) *Failure to have the head car lighted.* Admittedly Dickens was on the lead end of the head car with a lighted lantern when Tiller was struck, or up to a few feet of the point where he was struck. Here again, as in the two preceding instances, plaintiff herself, has proved by her own witnesses, that her allegation is untrue. And on this occasion the stipulation (R. 150) affirmatively establishes that on a movement of this kind it is not customary to light the head car. Surely out of their imagination a jury cannot say that a universal practice of railroads is a practice in which no reasonable and prudent railroad will engage!

We have pointed out heretofore that the stipulation shows that the practical construction placed upon the defendant's Rule 24 (R. 101) confines that rule to main line operations. If the stipulation might be disregarded, and if it could be surmised that the rule requires a lantern to be placed, as shown in the diagram, we have pointed out that it was physically impossible to place the lantern in that manner on a hopper car. Despite this, if a lantern be still required, Dickens had the lantern there. To be sure, it was not in the exact center. If this last fact be negligence, the plaintiff can make no capital of it, for he must prove the negligence to be the proximate cause, and no man could entertain the belief that had Tiller been standing on or near slow siding, he would have seen a stationary lantern on the center of the end, but would not have seen a waving lantern at the side of the end.

"The weight of the evidence under the Employer's Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury". (*Brady v. Southern R. Co.*, *supra*.)

4. *Failure to warn deceased of a hitherto unprecedented and unexpected change in the manner of shifting cars.* We refer to the factual statement, beginning on page 13 hereof. Two witnesses (Dickens and Wright) who had seldom been in Clopton prior to the accident, said that prior thereto, they had never seen the back-up movement on slow siding. One witness (Parrish) who was in Clopton two or three or four times a month had never seen it made. Two witnesses (Myrick and Orebaugh), of no great experience in Clopton, had never themselves made the movement. Three policemen (Angle, Ferguson and English), two of whom at one time alternated with Tiller in riding "First 209" (R. 145, 150), and one of whom had on occasions ridden it with Tiller (R. 144), had seen the move made. One witness of long experience in Clopton (Moore) had never himself made the movement, but he had seen other engines backing on slow siding, and it was developed in his testimony that frequently, if the road engine gets in the clear by dropping into No. 1 track, it must back out on to that track and slow siding. One witness of long experience (Huband) says the movement was very unusual, but "many times" had he seen a back-up movement on slow siding to enable an engine to get water, and "on other occasions" had he seen such a movement. One witness of long experience (Waymack) became so confused on the meaning of the word "unusual" that his testimony, which on the first trial was a clear negation of the allegation, amounts to nothing on this occasion—on direct examination, he says one thing, on cross, another. Two witnesses of long experience (Jones and Crews) say the movement is made "time and again" or "real often". All witnesses say there is nothing unusual about using any track at Clopton. This certainly cannot be considered as proof of an unusual movement. Furthermore we show later that the custom must be shown to have existed for the benefit of the class of employee to which the injured man belonged. There is not a line of evidence in this case so showing.

This matter is further discussed on pages 19 and 20 of our brief in opposition to the petition for the writ of certiorari, to which we respectfully make reference.

(5) *Failure to operate the train, engine and cars in a careful and prudent manner under the circumstances then and there existing.* There is not even a scintilla of evidence to support this allegation. The bell was ringing, the train was moving at four or five miles an hour in a manner in strict accord with approved railroad practices, as shown by the stipulation, and a man with a lighted lantern was on the lead end of the movement. For what more can anyone ask, much less, have a right to expect?

(6) *Failure to furnish deceased a reasonably safe place to work.* Here the evidence falls down hopelessly. The only two physical features of the yard that, from the evidence introduced by plaintiff, might be expected to be questioned, is the fact that the yard is not lighted, and that the clearance between tracks is that which the evidence shows it to be. Each of these is an engineering question, and as we show later is a matter for the determination of the railroad, not for the jury. But more important at this point is the fact that the stipulation shows that no yard of the size and character of Clopton is lighted, and the stipulation and oral evidence show lighting of yards is still in an experimental state. As to the spacing between tracks, the evidence shows the tracks in Clopton have the standard Coast Line clearance, and there is not a line of evidence tending to show that is not a reasonable clearance.

These six allegations of negligence are introduced by the allegation that defendant "knew or in the exercise of ordinary care should have known full well, the position of the decedent and the work in which he was engaged." The defendant did have knowledge that Tiller was assigned to guard "First 209," and was somewhere about his duties, but beyond that it had no knowledge and can be charged with no knowledge of his location.

Part of the theory of the plaintiff is that Tiller was

standing on or close to slow siding, just north of Clopton Road. This part is not inconsistent with the facts, as shown in evidence. But the theory advanced by Superintendent Murchison, in his letter of April 4, 1940, that Tiller stepped down from the Byrd Street cars into the path of the road engine, and the theory set forth in the report of April 9, 1940, of the Conductor and Engineer of the road engine, that Tiller got off the Byrd Street cars and backed into the back-up movement, are likewise not inconsistent with the evidence. We might state many other theories, each of which satisfies every known fact, as well as any other. The trouble here is that there are not enough known facts to warrant the drawing of a reasonable inference, and negligence cannot be presumed from the mere fact of an accident. (*Beamer v. Va. Ry. Co.*, *supra*; *Patton v. Texas P. R. Co.*, 279 U. S. 658, 45 L. Ed. 361, 21 S. Ct. 275).

No evidence establishes the theory that Tiller was standing on or close to slow siding, just north of Clopton Road, and no evidence establishes the theory that defendant should have expected him to be there rather than at another point in the yard. This evidence, if it establishes anything, establishes the fact that Tiller followed no routine; that one night he came to Clopton by one means, another night by another; that he had been seen doing his work all over Clopton, that sometimes he checked seals at Byrd Street, sometimes at Clopton, sometimes in between.

This is not such a case as was *Tennant v. Peoria, etc. R. Co.*, *supra*. There, a switchman was killed by a backing engine, which had started without ringing its bell, and contrary to a rule of the company. Shortly before the engine began to back, the engineer saw the switchman walk to the rear end of the engine, and it was the duty of the switchman "to stay ahead of the engine as it moved back out of track B-28, protect it from other train movements, and attend to the switches." There was no direct evidence of the precise location of the switchman when killed, but there was "strong evidence that he was killed approxi-

mately at the point where the engine began this backward movement". And, in addition to all this, there was the presumption that he was at the place at which his assigned duties would place him. Here, on the other hand, no one saw Tiller. His assigned duties no more placed him on or near slow siding than they placed him at any other point in the yard, and the evidence shows that no man had any more reason to expect him to be there than at some other point.

The other part of the plaintiff's theory is that Tiller was flashing his flashlight on the seals of cars passing on southbound main line. This part is founded on the report to the State Corporation Commission and on that report alone. This record positively disproves that part of the theory. We know the cars on southbound main line were not moving, they were standing. We know Tiller was not holding a lighted flashlight, for men in position to see his light, if it was lighted, saw no light.

On the most favorable aspect of the case to the plaintiff, the report to the Corporation Commission would be admissible only as an admission against interest. But, when it is shown that its author knew none of the facts, did not correctly report the inferences given to him, and that no man in Clopton that night knows where Tiller was when he was hit or what he was doing, the weight of the report is less than a scintilla, it is nothing.

When this case was formerly before the Supreme Court, it accepted the theory of the plaintiff that Tiller was standing on or close to slow siding flashing his flashlight on the seals of cars passing on southbound main line. The Supreme Court said:

"Tiller was standing between two tracks in the respondent's switch yard. \* \* \* Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track."

The record then was different from the record now. Then the District Court had sustained defendant's motion for a directed verdict at the conclusion of plaintiff's evidence. A part of that evidence was the report to the State Corporation Commission. As defendant introduced no evidence, it was not then shown that this report was imaginary. Now, however, on the present record, there is nothing to sustain the theory.

Not only must plaintiff prove negligence, she must likewise prove the act of negligence to be the proximate cause of the injury and death. This point we cannot discuss, because there is nothing in relation to which it can be considered. We mention it because some of the cases to which we are about to refer turn on speculation with reference to proximate cause, others on speculation with reference to negligence.

In *Atchison, etc., R. Co. v. Toops*, 281 U. S. 351, 74 L. Ed. 603, 50 S. Ct. 281, the body of a conductor, who was looking after the backward movement of box cars, was found under the wheels of the tender. It was alleged that his death was attributable to negligence in carrying out the kicking movement of the grain cars without signal and without placing a flagman or light on them.

Mr. Justice Stone, delivering the unanimous opinion of the court, said:

"But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361; *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; *St. Louis-San Francisco Ry. Co. v. Mills*, 271 U. S. 344, 347, 46 S. Ct. 520, 70

L. Ed. 979; *Chicago M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041; *New York Central Railroad Co. v. Ambrose*, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562, decided February 24, 1930."

In *Chicago, M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, 46 Sup. Ct. 564, the circumstantial evidence was far stronger than in the case at bar. It was the duty of Brakeman Coogan to go between the cars to couple the air hose. Near where his body was found there was a piece of pipe fastened to the cross ties by clamps and spikes. The left shoe which he wore at the time was scratched and showed a marked rounding impression. It was inferred that Coogan caught his foot under the pipe and a verdict for his administrator was approved by the trial court and the highest state court. The Supreme Court of the United States reversed the judgment and said:

"\* \* \* Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed \* \* \*."

In conclusion the court said:

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 524, 45 S. Ct. 169, 69 L. Ed. 419. When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. *Pauling v. United States*, 4 Cranch, 219, 221, 2 L. Ed. 601; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564; *St. L. & Iron Mtn. Ry. Co.*

v. *McWhirter*, *supra*, 282 (33 S. Ct. 858); *St. Louis-San Francisco Ry. v. Mills*, 271 U. S. 344, 46 S. Ct. 520, 70 L. Ed. 979, decided May 24, 1926."

In *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391, deceased was riding on the lead car of a string of cars being shunted into a spur track. He was knocked or fell from the car and was injured.

The Court said:

"We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Pleasants v. Fant*, 22 Wall. 116, 120, 121, 22 L. Ed. 780. And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning v. Cooley*, 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 660, 21 S. Ct. 275, 45 L. Ed. 361. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch v. Boston*, 101 U. S. 16, 18, 25 L. Ed. 980; *Barrett v. Virginian Ry. Co.*, 250 U. S. 473, 476, 39 S. Ct. 540, 63 L. Ed. 1092, and cases cited; *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. Ed. 958. The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned. *Schuylkill & D. Improvement & R. Company v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *Small Co. v. Lamborn &*

*Co.*, 267 U. S. 248, 254, 45 S. Ct. 300, 69 L. Ed. 597; *Gunning v. Cooley, supra*; (C. C.) at pages 443-444 of 78 F.

"Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible. *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; *Gulf, etc., R. R. v. Wells*, 275 U. S. 455, 459, 48 S. Ct. 151, 72 L. Ed. 370; *New York C. R., Co. v. Ambrose, supra*; *Stevens v. The White City, supra*."

It is elementary law that where there are two or more causes which may have produced an accident, for some of which a defendant would be liable, and not for others, and it is just as probable that it resulted from one cause as another, there can be no recovery.

In the *Chamberlain Case, supra*, the Supreme Court of the United States said:

"We, therefore have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover."

The court cites a number of state and federal cases sustaining this principle, among them *Smith v. First National Bank of Westfield*, 99 Mass. 506, 97 Am. Dec. 59, from which it quotes with approval the following language:

"There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. \* \* \*"

In *Stephens v. The White City*, 285 U. S. 195, 761 L. Ed. 699, 52 S. Ct. 347, the Court said:

“ \* \* \* The evidence is consistent with an hypothesis that the tug was not negligent and with one that it was, and therefore has no tendency to establish either \* \* \* ”

In *New York Central R. Co. v. Ambrose*, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562, an employee was found at the bottom of a grain bin in which a poisonous gas to kill insects had been put. The bin was uncovered, but there was no evidence showing who removed the top. The Court said:

“The utmost that can be said is that the accident may have resulted from one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough. \* \* \* ”

For the Virginia authorities on this subject, see *C. & O. Ry. Co. v. Heath*, 103 Va. 64, 48 S. E. 508; *N. & W. Ry. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; and *C. & O. Ry. Co. v. Catlett*, 122 Va. 232, 94 S. E. 934.

The Supreme Court has recently decided two interesting cases that have reference to this point: *Brady v. Southern Ry. Co.*, *supra*, and *Tennant v. Peoria, etc. Ry. Co.*, *supra*.

In the *Brady Case* a brakeman was killed when cars being backed on a switch track passed over the wrong end of a derailer, which was closed so as to prevent cars from drifting out of the switch track and by reason thereof derailed. The jury found for the plaintiff, and the trial court entered judgment. The Supreme Court of North Carolina reversed for lack of evidence of negligence, and this action the Supreme Court affirmed. There were three claims of alleged negligence: *first*, that a light should have been put on the derailer—this the Court swept aside because there was no evidence that such a light was customary or desirable; *second*, that another employee had set the derailer without warning the decedent—this the Court rejected, for the evidence did not show who set it, and under the evidence, it was quite possible that the deceased, himself, had done

so—"it was mere speculation as to whether that negligence is chargeable to decedent or another"; *third*, the rail opposite the derailer was known to defendant to be defective—this the Court accepted; it said it was not the proximate cause, because it was not reasonable to expect that cars would pass over the wrong end of the derailer.

In the *Tennant Case* a switchman was killed in a yard by a back-up movement. The jury found for the plaintiff and the District Court entered judgment. The Circuit Court of Appeals held that judgment for the defendant should have been directed. The Supreme Court reversed and re-established the verdict. The evidence showed that the engineer had seen Tennant near the rear of the engine shortly before it backed, and that Tennant's duty required of him that he stay ahead of the engine as it backed. A company rule required that the engine bell be rung "when an engine is about to move", and there was *conflicting* evidence on the questions whether "this rule was for the benefit of crew members who presumably were aware of switching operations and as to whether it was a customary practice for the bell to be rung under such circumstances". The Circuit Court of Appeals had not questioned the fact that there was sufficient evidence to sustain a finding of negligence, but it held there was no evidence that the failure to ring the bell was the proximate cause of the death. The Supreme Court pointed out that physical facts showed Tennant to have been struck just as the back-up movement began—at the point his known duty required him to be. It accordingly held that the jury had before it evidence from which it might draw the inference of proximate cause.

In the *Brady Case*, the evidence did not contain proof of certain facts essential to support the findings of negligence and proximate cause—to sustain those findings those missing facts had to be supplied by conjecture and speculation. In the *Tennant Case* there was evidence of the essential facts, and the Supreme Court did again that which it has frequently done—it held that a verdict could not be set aside

because a Court felt another inference, drawn from the evidence, to be the "more reasonable".

In the *Brady Case*, the minority of the Court felt it was able from the record to point out evidence of two acts of negligence, and evidence of essential facts in the chain of causation. No person yet in this case has been able to put his finger on an act or omission of defendant, and say, "This is evidence of negligence." There is an entire lack of proof of facts essential to establish causation. No man can answer the question, where was Tiller and what was he doing, without, by speculation and conjecture, evolving out of thin air facts necessary to be supplied. From facts, the jury may draw inferences, but it cannot assume the facts.

The former decision of the Supreme Court in this case did not alter the law in these respects. In both the *Brady Case* and the *Tennant Case*, that former decision is cited in support of these principles. In referring to that decision, the Supreme Court of Appeals of Virginia said in *Beamer v. Virginian Ry. Co.*, *supra*:

"There is nothing new in the test in the Tiller case to determine when a case should go to the jury or when it should be withheld."

*b. The Evidence does not establish a Violation of the Boiler Inspection Act or Proximate Cause.*

The Circuit Court of Appeals did not pass upon the question whether the road engine was being used in road or yard service, when it backed north on slow-siding. It proceeded on the "assumption" that it was being used in yard service, and a violation of the Boiler Inspection Act, being thus assumed, it inquired whether that violation was a proximate cause of the injury and death. It found that causal connection did not exist.

Admittedly the road engine did not have on its rear a headlight. The rules and regulations of the Interstate Com-

merce Commission issued pursuant to the Boiler Inspection Act require a headlight on the rear of a "locomotive used in yard service between sunset and sunrise" (R. 22) and also of a "locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train or in making terminal movements" (R. 21).

If the road engine, as we contend, was being used in road service, no headlight was required on the rear, for the uncontradicted evidence is that this engine was not "regularly required to run backward for any portion of its trip." (Page 8 hereof). Again, the movement of the road engine was primarily to get out of the way, so that the yard engine might classify the train, and secondarily, to pick up that portion of its train which the yard engine would leave for it on southbound main line.

Plaintiff insists that the road engine was being used in "yard service". The evidence to which we have heretofore referred on pages 15-18, inc., hereof, shows conclusively that a road engine which brings cars into a yard, and then gets out of the way so as to permit a yard engine to classify the train, is being used in road service—whether its movement in getting out of the way is forward or backward.

The Court left to the jury the determination whether or not the engine was being used in "road" or "yard" service. This is a technical question. The jury could not make its own definition of those terms; it had to arrive at that definition from evidence. In the testimony of witnesses on this point, there is literally no conflict whatsoever. They all say the use was road service, and those who are called upon to explain what, in railroad parlance, road service is, agree *in toto*.

So far as we are aware, but one court in this country has had occasion to consider these terms, and nothing which we say here is inconsistent therewith. In 1932 the Circuit Court of Appeals for the Sixth Circuit decided *C. & O. Ry. Co. v. Wood*, 59 F. (2d) 1017. There a road engine had come

into the Ronceverte, W. Va. yards and was delivering into a spur track some cars which it had brought with it. Another engine, which for six months had been in those yards for the purpose of helping make up the train which the road engine was to take east, and which also acted as a pusher for that train to aid it to get it over the mountains, was backing light, to pick up a caboose in the yard for the purpose of adding it to the train. While so backing, it struck Wood. The Court held that this last mentioned engine was being used in yard service and said it

“was being used wholly within the yards for the purpose of building or making up the train.”

In commenting on the meaning of Rule 129 (b)—the road service rule—the Court said

“\* \* \* rule 129 (b) applies to a locomotive making regular trips with a train from one point to another over the road and which is from necessity required to run backward for some portion of such trips.”

The Boiler Inspection Act permits rules relating to locomotives and tenders. It does not relate to other equipment. It is questionable, even if Rule 129 (b) otherwise applied, whether in this instance, the road engine was “running backward” within the meaning of the Rule. It was pushing cars. The Rule could scarcely be construed to mean that a road engine pushing cars must under these circumstances have a rear light, when that light would, of necessity, be obscured.

And that brings us immediately to the question of proximate cause. Is there any evidence to indicate that a failure to have a headlight on the rear of the tender was a proximate cause of the injuries and death? The evidence is undisputed. If there had been a headlight, it would have shone up against the rear of the adjacent hopper car, and light would have been diffused out to the sides and upward

—not directed up the track (page 8 hereof). If the plaintiff's conjecture be true and if Tiller was standing on or near slow siding, facing in such direction that he did not see Dickens' lantern bearing down on him, he could not have seen this diffused light. If he was ignorant of the back-up movement, and alighted from the Byrd Street cars in its path or backed into it, the same thing is true. If he was aware, as he may have been, of the back-up movement, and slipped, the absence of a rear headlight was no cause of any kind.

A violation of a Safety Appliance Act creates no cause of action unless it is the proximate cause of an injury. This is established law. (*Lang v. N. Y. Cent. R. Co.*, 225 U. S. 455, 65 L. Ed. 729, 41 S. Ct. 381; *Brady v. Terminal R. Assn.*, 303 U. S. 10, 82 L. Ed. 614, 58 S. Ct. 426; *Powell v. Waters*, 55 Ga. App. 307, 190 S. E. 615).

Plaintiff recognizes the strength of our position on this matter of proximate cause, and the failure of the evidence to establish causal connection between the absence of a rear headlight on the tender and the injuries and death of Sergeant Tiller. She, accordingly, attempts to rewrite the Rules and Regulations of the Interstate Commerce Commission, and contends that they require of a locomotive used in yard service, that it not only have a rear headlight, but that it refrain in the nighttime from pushing cars so as to obscure that headlight. To this contention, we have replied fully on pages 16 and 17 of our brief in opposition to the granting of the petition for certiorari, to which we now refer.

### ***3. It was Error to admit in Evidence the Report to the State Corporation Commission of Virginia.***

This report was introduced, over objection, in evidence on the first trial. On the first appeal to the Circuit Court of Appeals we called attention to its inadmissibility. As that court affirmed, there was no occasion for it to pass upon the question. It was not raised before the Supreme Court.

In express words the Constitution gives Congress the right to regulate commerce among the several states (Article I, sec. 8). And in *Gibbon v. Ogden*, 9 Wheat. 1, Chief Justice Marshall said that this power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." It is familiar law that when Congress has acted in a matter within its constitutional powers, all State enactments on the subject fall. (*Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169).

In *Northern Securities Company v. U. S.* 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436, Mr. Justice Harlan said:

"\* \* \* So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce whether founded in wisdom or not, must be submitted to by all. \* \* \*"

The Federal law (45 U. S. C. A. 38, 40) provides for monthly reports of accidents by railroad companies to the Interstate Commerce Commission and an investigation by the Commission, and then provides:

"§41 *Reports not Evidence in Suits for Damages:* Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

The Virginia Statute (Code sec. 3988) provides for monthly reports of accidents in the same words as the Federal law, but omits the provision of section 41, *supra*, providing that the reports shall not be used as evidence.

The report to the Virginia Commission was introduced in evidence over the objection and exception of the defendant. If it had been excluded, there would not have been

a scintilla of evidence before the court of the manner in which Tiller received the injuries complained of.

In the usual course of events the same factual statement would have been made to the Interstate Commerce Commission and the Virginia Commission, but it was brought out on cross examination that the clerk who made up the report to the Virginia Commission made an error in the report to that Commission in stating the facts positively instead of conjecturally as he had stated them to the Interstate Commerce Commission (R. 161).

We are here dealing with Federal enactments in a Federal Court, and it would be an anomaly if the State law, by omitting the provision that the report to it should be inadmissible, could thereby make such report admissible in a Federal court contrary to the expressed policy of Congress.

It is familiar law that State enactments on matters of interstate commerce fall when Congress speaks on the subject, and it can hardly be that the failure of a State to enact a provision of a Federal statute would result in the admission of evidence which the Federal statute expressly declares inadmissible. It is well settled that the law of the forum controls as to the admissibility of evidence. (15 C. J. S. p. 955.)

It is clear that Congress intended by section 41, *supra*, to make reports to the Interstate Commerce Commission confidential. Its purpose was two fold, namely, it wanted a frank statement of the cause of the accident from the carrier, and it did not want the carrier to be able to use the report as a self-serving declaration. To allow a State to circumvent the express intention of Congress by enacting a similar law and omit the provision that the report to it should not be used, would nullify the law.

The trend of Federal decisions is to make the provisions of all such acts of Congress uniform, absolute, and immutable. This is the "pattern" set forth in the recent decision in *Mid State Horticultural Co. Inc. v. Pennsylvania R. Co.*, decided November 22, 1943, 319 U. S. 735,

87 L. Ed. 1695, 64 S. Ct. 128, in which an agreement by a shipper not to plead the statute of limitations in an action by a carrier for freight charges was declared illegal. The Court said:

“\* \* \* We think petitioner's position must be sustained. In short this is that the agreement is invalid as being contrary to the intent and effect of the section and the Act.”

And further in the opinion the Court says:

“\* \* \* Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standard is required.” Citing *L. & N. R. Co. v. Maxwell*, 237 U. S. 94, 87 L. Ed. 1695, 35 S. Ct. 494.

See also *Napier v. A. C. L. R. Co.*, 272 U. S. 605, 71 L. Ed. 432, 47 S. Ct. 207.

We submit that the clear intent of Congress was violated by the admission of the report to the Virginia Commission.

***4. The Question of an Unexpected or Unprecedented Movement is not Here Involved, and if Involved the Jury was not Correctly Instructed on that Phase of the Case.***

In that portion of the factual statement devoted to this matter (pp. 13-15, inc., hereof), we have summarized all the evidence on this point. In that portion of this Argument devoted to a discussion of the lack of evidence to support the verdict, we pointed out the total lack of evidence to sustain the allegation that a back up movement of the road engine was unexpected (pp. 37-38, inc., hereof).

The Circuit Court of Appeals held that under this evidence there was no duty on the railroad to give a special warning to Tiller of the back-up movement. Hence, the

question of an unexpected move should not have been submitted to the jury.

Even if a warning was required, we earnestly submit that the only practical warning was given—the automatic bell was continuously rung. We had no way of knowing where Tiller was on the yard. In argument before the Circuit Court of Appeals it was suggested we should have searched for him and warned him by word of mouth. That is preposterous on its face.

This matter should not have been submitted to the jury. But there was further error. The instruction itself did not correctly submit it.

The Court charged as follows on the question of an unusual or unexpected movement (R. 185):

“The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back up movement on the night of March 20th, 1940; that such movement was an unusual and unexpected one and a departure from general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff.”

This instruction is erroneous in that it does not completely instruct the jury on the theory of an unusual movement. One who is injured by an unusual or non-customary movement is not entitled to relief by virtue of that fact alone. The evidence must show that the custom has been established for the benefit of that class of employee or person to which he belongs. We specifically called the attention

of the lower court to this and requested that, if the matter of an unusual movement should be left to the jury, the charge contain mention of this essential feature.

In *C. & O. R. Co. v. Mihas*, 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42, the established law on this subject was laid down. Mihas was an employee engaged in work on and about the tracks. In attempting to climb over a coal car, which was part of a string of standing cars, he was injured when a number of cars were propelled against it by means of a flying switch. Those engaged in the movement had no knowledge of Mihas' position or his movements. The alleged negligence of which complaint was made was that there was an established custom to give notice and warning to all persons in or about standing cars before other cars were shunted against them, and that such notice was not given to Mihas. The evidence, however, showed that warning was given exclusively to persons, not employees, engaged in unloading cars. Judgment for the injured employee was reversed and the Supreme Court held that a directed verdict in favor of the railroad should have been entered. The Court said:

"If there was a violation of a duty, therefore, on the part of the railroad company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant. In *Ches. & O. R. Co. v. Nixon*, 271 U. S. 218, 70 L. Ed. 914, 46 S. Ct. 495, the facts were that a section foreman whose employment obliged him to go over and examine the track, was on a tour of inspection. For that purpose he used a velocipede fitted to the rails. He was overtaken by a train and killed. The negligence charged was that the engineer and foreman of the train were not on the look out; and the proof was to that effect. It was held that that duty was one which the railroad company might owe to others but not towards the class of employees to which the deceased belonged; and a recovery for his death was reversed."

*In Fernard v. Boston & M. R. Co.*, 62 F (2d) 782, the employee was a car inspector. He was standing on one track inspecting cars on an adjacent track when he was struck by a movement taking place on the track on which he was standing. The evidence was conflicting. There was evidence of a custom that cars should not be shunted along a track adjacent to one on which cars were moving, and that this custom was for the benefit of employees making inspections. The District Court instructed simply that, if the custom existed and was violated, and the violation was the proximate cause of the employee's death, the plaintiff was entitled to a verdict. The Circuit Court of Appeals held this to be erroneous, saying:

"But it had no right to return a verdict for the plaintiff, unless he belonged to the class for whose benefit the custom was established, namely, the employees engaged in making running inspection, and unless he was about that business at the time of the accident."

In giving the instruction as worded the District Court relied upon the decision of the Fourth Circuit Court of Appeals in *C. & O. R. Co. v. Peyton*, 253 F. 734. Peyton was working on a coal pier on which two tracks were located. The motor had been running on the North track and the plaintiff introduced evidence tending to show an established custom that employees were notified before the motor changed from one track to the other. He was struck by the motor which had shifted over to the south track. The evidence for the defendant was that the motor ran on either track as occasion required, and there was no custom of giving notice to employees. There was thus a sharp issue in the testimony. Judgment for the plaintiff was sustained.

We have carefully examined the record and briefs in the *Peyton Case* on file in the clerk's office of the Circuit Court of Appeals. In them no mention is made of the necessity that a custom be for the benefit of employees of a class to

which the injured employee belongs, and in the instruction of the District Court in that case no mention of this feature is made, nor in its opinion does the Circuit Court mention that matter. We find nothing, however, in the *Peyton* case inconsistent with that which we have heretofore said. The plaintiff's evidence in the *Peyton* case was of a custom that notice was given to employees working on the pier before the motor changed from one track to the other. Admittedly, if the custom existed, the injured employee who worked on the pier was within the class for whose benefit the custom existed. If the decision of the Circuit Court in the *Peyton* Case is to be construed as meaning that a person injured as the result of violation of custom can recover whether or not he belongs to the class of persons for whom the custom exists, then the *Peyton* case is contrary to the doctrine laid down by the Supreme Court which we believe to be a universal doctrine recognized throughout the country. But, as the point was not raised in that case, and as the custom, if it existed, showed on its face that it existed in part for the injured employee, there was no occasion to raise it.

But that is not the case here. Assuming for the moment that the use of slow siding for a back up movement was violative of custom, there is not a line of evidence to show for whose benefit the custom existed. Tracks exist in order that they may be used, and if one were to speculate, it would be much more logical to suppose that such a custom, if it existed, did exist because of Clopton Road and for the benefit of persons using that Road, than that it existed for the benefit of special railway police whose duties call them everywhere.

##### ***5. The Road Engine was being used in "Road Service."***

As we have heretofore pointed out (pp. 15-18, inc., and pp. 48-50, inc., hereof), this evidence shows that the road engine was engaged in "road service" and not "yard service". We requested that the Court so instruct, but the Court

left to the jury the determination of the character of service in which the road engine was engaged. At the points in this brief just referred to, we have fully discussed this matter and shall not repeat ourselves.

***6. No Statute or Regulation adopted pursuant to Statute required a Light on the Lead End of the Back Up Movement.***

We requested that the Court charge that no statute, or regulation adopted pursuant to applicable statute, imposed on the defendant the duty of placing a light of any kind on the lead end of the back up movement. This the Court refused to do. There was involved in this case when it went to the jury a number of statutory or regulatory requirements. The Court saw fit to instruct on features of the Boiler Inspection Act. It also told the jury (R. 186) that:

“To such extent as any statute or regulation promulgated pursuant to statute requires any specific mechanical device or facility, the railroad must furnish it. \* \* \*.”

There had been much evidence on the question of the lighting of yards, and since no statute or regulation requires a railroad to light its yards, the Court specifically so told the jury (R. 186). From beginning to end in this case there was evidence and discussion of lights on the rear end of a back up movement. No statute or regulation, pursuant to statute, requires such a light but when, as in this case, the Court saw fit to instruct on matters required by statute and generally otherwise on matters governed by common law, we were entitled to have the jury told that neither Congress nor the regulatory bodies had ever seen fit to require a light on the lead car of a back up movement. We were entitled to have the jury know what had been made mandatory by statute and what had not.

Judge Cooley in one of his great constitutional decisions, *Twitchell v. Blodgett*, 13 Mich. 127, had occasion to remark

upon the equal importance at times of determining what a matter is and what a matter is not. He said:

“In this view it becomes not less important to determine what the question is *not*, than what it *is*.”

In the instant case it was just as important to advise the jury what was *not* covered by statute and regulation as to advise them what *was* covered thereby.

***7. The Court should have Charged that Engineering Questions are left to the Decision of the Railroad and are not reviewable by the Jury.***

The plaintiff introduced evidence showing that the tracks at Clopton Yard had the standard Coast Line clearance and that if on one track there was a freight car and adjacent thereto on another track there was a hopper car, the clearance between the two cars is three feet eleven and a half inches. There was much talk of the lighting of the yards. This case was left to the jury to be determined under all the facts and circumstances, one of which was the spacing between tracks, and another was that the Clopton Yard is not lighted by overhead lights. These two engineering facts and particularly that of the spacing of tracks is commented on by the Supreme Court in its former opinion. Since engineering questions of this kind are left to the determination of the railroad and are not reviewable by a jury, we requested that the Court charge that such matters as the space to be maintained between tracks in railroad yards and other engineering questions are left to the decision of the railroad and its decision on such matters is not reviewable by the jury. The Court declined so to instruct. For all we know, the jury may have taken these engineering questions into consideration and reached a conclusion that the railroad could have solved them in a better way than it did solve them.

In *B. & O. R. Co. v. Groeger*, 266 U. S. 521, 69 L. Ed. 419, 45 S. Ct. 169, it is said:

"It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers, will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officials and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end. *Tuttle v. Detroit, etc. R. Co.*, 122 U. S. 194, 30 L. Ed. 1116, 7 S. Ct. 1166; *Richards v. Rough*, 53 Mich. 216, 18 N. W. 785."

In *Delaware, etc. R. Co. v. Koske, supra*, it is said:

"There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect to such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries."

**8. *The Jury should have been Instructed to Disregard Company Rule 103.***

In the Statement of Fact we discussed this matter at pages 19-20 hereof. The defendant's Rule 103 requires that when cars are pushed by an engine, except when shifting

or making up trains in yards, a trainman must take position on the front of the leading car and when shifting over public crossings at grade not protected by watchmen a member of the crew must protect the crossing.

The evidence conclusively shows that on the back up movement in question a trainman with a lantern was on the front of the leading car when Tiller was struck or up to a point within a few feet of that at which he was struck. The evidence further shows that Clopton Road is not protected by a watchman but that a member of the train crew, Dickens, did protect that crossing. It accordingly developed that this Rule has no relation to this case and the jury should have been so instructed.

***9. The Jury should have been Instructed to Disregard Company Rule 24.***

At page 20 of the statement of fact we have called attention to defendant's Rule 24 and evidence relating thereto. This rule requires that when cars are pushed by an engine, except when shifting or making up trains in yards, a white light must be displayed on the front of the leading car by night. We have pointed out that in practical construction the rule applies to main line operations. Even if it applies to yards, there was a light at the front of the leading car.

***10. If One or More of Several Issues is Erroneously submitted to the Jury, a General Verdict cannot be sustained.***

We have discussed this point at length on pages 20-25, inc. of our brief in opposition to the petition for a writ of certiorari, to which we now refer.

## **CONCLUSION**

We accordingly respectfully submit that, because of an entire failure of the evidence to establish negligence and

also to establish the proper chain of causation, the District Court should in this case have directed a verdict. We do not believe it is possible, from a study of the record now before the Court, for any person to specify any act or acts of negligence and support it by the record. If the field of speculation and conjecture may be roamed in at will, and if from that field one is permitted to gather such additional facts as he would like for the record to show, then a finding of negligence could be made, and the law as we know it, i. e. that from the fact of an accident negligence cannot be presumed, is swept into the discard.

We further respectfully submit that, at the least, as found by the Circuit Court of Appeals, there was error in submitting to the jury the questions of the Boiler Inspection Act and of an unexpected movement. In addition, there was error in permitting the plaintiff to amend; in the admission of certain evidence and in the instructions. Any one of these errors, standing alone, would require a new trial.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 335.—OCTOBER TERM, 1944.

Hattie Mae Tiller, Executor of the  
Estate of John Lewis Tiller, De-  
ceased, Petitioner,  
vs.  
Atlantic Coast Line Railroad  
Company.

On Writ of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Fourth Circuit.

[January 15, 1945.]

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner's husband was killed while in the performance of his duties as an employee of respondent railroad. She filed suit under the Federal Employers Liability Act, 45 U. S. C., Sec. 51 *et seq.*, alleging that her husband's death was caused by the negligent operation of a railroad car which struck and killed him, and because of respondent's failure to provide him a reasonably safe place to work. The District Court directed a verdict in favor of the railroad and the Circuit Court of Appeals affirmed. 128 F. 2d 420. We reversed, holding that there was sufficient evidence of the railroad's negligence to require submission of the case to the jury. *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 68, 73. On remand, petitioner amended her complaint in the District Court, over respondent's objection, by charging that, in addition to the negligence previously alleged, the decedent's death was caused by the railroad's violation of the Federal Boiler Inspection Act, 45 U. S. C., Sec. 22 *et seq.*, and Rules and Regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of that Act. The jury returned a verdict in favor of petitioner, and the District Court refused to set it aside. The Circuit Court of Appeals reversed, 142 F. 2d 718, and certiorari was granted because of the importance of questions involved relating to the administration and enforcement of the Federal Employers Liability Act and the Federal Boiler Inspection Act. 323 U. S. —.

Here, as in the Circuit Court of Appeals, respondent has again argued that the evidence of negligence charged in the original complaint was insufficient to justify submission of the case to the jury. Slight variations in the evidence presented at the two trials are said to require a different conclusion than that which we reached on the first review of this case.

As to this contention of respondent, the Circuit Court of Appeals said on the second appeal that

"Since the evidence at the second trial in respect to the movement of the cars was substantially the same as at the first, this decision [i. e. our decision in 318 U. S. 54] required the District Judge notwithstanding the opposition of the defendant to submit the case to the jury. Our duty upon this appeal to affirm the judgment . . . would have been equally clear if the plaintiff had been content at the second trial to rest upon the legal theory outlined in the opinion of the Supreme Court; but the plaintiff amended the complaint by specifying a new item of negligence which was submitted to the jury as an alternative ground for recovery. Since the verdict for the plaintiff was general and did not specify the ground on which it rested, it becomes necessary for us to determine whether there was sufficient evidence to justify the submission of this new theory to the jury over the defendant's objection."

We reaffirm our previous holding that the evidence justified submission to the jury of the issues raised by the original allegations of negligence.

The Circuit Court of Appeals, however, held that there was no evidence that the alleged violation of the Boiler Inspection Act was "the proximate cause of the accident in whole or in part", and that the District Court should therefore have directed that this issue be found in favor of the railroad. The complaint alleged, in this respect, that the decedent's death was caused by violation of Rules and Regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of the Federal Boiler Inspection Act. That Act broadly authorizes the Commission to prescribe standards "to remove unnecessary peril to life or limb."<sup>1</sup> The complaint alleged a violation of Rule 131 of the Commission, which reads as follows:

*"Locomotives used in yard service.*—Each locomotive used in yard service between sunset and sunrise shall have two lights, one

<sup>1</sup> *Lilly v. Grand Trunk Western Railroad Co.*, 317 U. S. 481, 486; *United States v. B. & O. R. Co.*, 293 U. S. 454.

located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The locomotive which pushed backwards the string of cars one of which struck and killed the deceased was operated in violation of the literal words of this Regulation. It was being used in "yard service" at respondent's Clopton Yards "between sunset and sunrise." There was no light on the rear of the locomotive, which was moving in reverse towards the deceased.<sup>2</sup>

It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death. The ruling of the court below that it was not a proximate cause was based on this reasoning: The general railroad practice in yard movements is to push cars attached to the rear of an engine; no express regulation of the Commission prohibits this; in the instant case the cars attached to the engine necessarily would have obscured any light on the rear of that engine; the light so obscured would not have enabled the engineer to see 300 feet backwards so as to avoid injuring the deceased; nor would the light have been visible to the deceased standing at or near the track ahead of the backward movement. Therefore, the court concluded, the failure to furnish the light was not proximately related to the death of Tiller.

Assuming, without deciding, that the railroad could consistently with Rule 131 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light

<sup>2</sup> The contention is made that since this locomotive was used in road service as well as yard service the Rule should be held inapplicable to it as a matter of law. Such a narrow interpretation of the Regulation would be wholly out of keeping with the liberal construction which we have constantly said must be given to this and the Safety Appliance Act, 45 U. S. C. A., Sec. 1 *et seq.* *Lilly v. Grand Trunk Western Railroad Co., supra*, 486.

We think the court's charge to the jury on this point was consistent with a proper interpretation of the rule. That charge was:

"If the jury believes from the evidence that the road engine, on the night Mr. Tiller was injured, in making the movements it made in said yard was being used by the defendant to classify its cars and make up its train, then the said engine was then being used in yard service. On the other hand, if the jury believes from the evidence that the said road engine was backing into slow siding for the purpose of getting out of the way of the yard engine so that said yard engine could classify cars and make up trains, then said locomotive in making said movement was not being used in yard service."

did not contribute to Tiller's death. The deceased met his death on a dark night, and the diffused rays of a strong headlight even though directly obscured from the front, might easily have spread themselves so that one standing within three car-lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 33. And "The standard of care must be commensurate to the dangers of the business." *Tiller v. Atlantic Coast Line Railroad*, *supra*, 67.

An additional ground of the reversal of this cause by the Circuit Court of Appeals was that part of the District Court's charge to the jury set out in the margin.<sup>3</sup> It instructed the jury that if they believed that the back-up movement was an unusual and unexpected one, and a departure from the general practice in making up that particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of that movement and if the jury found that the defendant failed to perform this duty, and that failure was the proximate cause of the injury, its verdict should be for the plaintiff. The original complaint alleged this as one of the grounds of negligence. The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one. Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. We cannot say that a jury could not reasonably find negligence from the evidence which showed such

<sup>3</sup> "The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back-up movement on the night of March 20th, 1940; that such movement was an unusual and an unexpected one and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff."

an unprecedented departure from the usual custom and practice in backing cars, without giving "adequate warning of the movement." Compare *Toledo, St. Louis & W. R. R. v. Allen*, 276 U. S. 165, 171.<sup>4</sup> The charge of the District Court in this respect was correct.

Respondent seeks to support the Circuit Court's reversal of the cause on the ground that the District Court erroneously permitted petitioner to amend her original complaint. The injury occurred March 21, 1940. Suit was filed under the Federal Employers Liability Act on January 17, 1941. (The amendment alleging violation of the Boiler Inspection Act was filed June 1, 1943, which was more than ~~two~~ years after the death. Federal Employers Liability Act, Sec. 6, provides that a suit under that Act must be commenced within ~~two~~ years after injury. The contention is that the ~~two~~ year limitation statute provided in the Federal Employers Liability Act barred the amendment which rested on the Boiler Inspection Act.)

We are of the opinion that the amendment was properly permitted. Section 15(c) of the Federal Rules of Civil Procedure provides that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." The original complaint in this case alleged a failure to provide a proper lookout for deceased, to give him proper warning of the approach of the train, to keep the head car properly lighted, to warn the deceased of an unprecedented and unexpected change in the manner of shifting cars. The amended complaint charged the failure to have the locomotive properly lighted. Both of them related to the same general conduct, transaction and occurrence which involved the death of the deceased. There was therefore no departure. The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased. "The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant." *Maty v. Grasselli Co.*, 303 U. S. 197,

<sup>4</sup>See *Ches. & Ohio Ry. v. De Atley*, 241 U. S. 319; *Ches. & Ohio Ry. v. Peyton*, 253 Fed. 734 (C. C. A. 4); *Ferringer v. Crowley Oil & Mineral Co.*, 122 La. 441; *L. & N. E. Co. v. Asher's Admr.*, 178 Ky. 67; *Dir. Gen'l v. Hubbard's Admr.*, 132 Va. 193; 2 *Shearman & Redfield on Negligence* (rev. ed.), 566, 607; cf. *Davis v. Phila. & R. Ry. Co.*, 276 Fed. 187.

201. There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.<sup>5</sup>

We find no error in the District Court's disposition of the case. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

*It is so ordered.*

The CHIEF JUSTICE and Mr. Justice ROBERTS are of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

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<sup>5</sup> See *Friederichsen v. Renard*, 247 U. S. 207; *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62; *United States v. Powell*, 93 F. 2d 788, 790.